APPENDIX

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1981-82

7 Div. 884

Robert Wheatt
V

State

Appeal from Talladega Circuit Court

BOWEN, JUDGE

The defendant was indicted and convicted of trafficking in cannabis in violation of Alabama Code 1975, Section 20-2-80 (1) (a) (Supp. 1981) 1. Sentence was six years' imprisonment and a fine of $25,000.00. The issues on appeal concern the constitutionality of Alabama's drug trafficking statutes.

The defendant's argument that the fining of an indigent defendant is unconstitutional is without merit. Under the defendant's reasoning, any fine levied against an indigent is excessive simply because the defendant is unable to pay the fine. Because the imprisonment of an indigent offender for failure to pay his fine is generally recognized as constitutionally impermissible, Williams v. Illinois, 399 U.S. 235, 90 S. Ct. 2018, 26 L.Ed. 2d 586 (1970); Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971), the result advocated by the defendant would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisomment for nonpayment whereas other defendants must always suffer one or the other on conviction. Tate, 401 U.S. at 399, 91 S. Ct. at 671. As noted in Tate, supra, and Williams, 399 U.S. at 244-5, 90 S.Ct. at 2024, there are other alternatives to which the State may constitutionally resort to serve its concededly valid interest in enforcing payment of fines, i.e., paying fines in installments.

In arguing that his fine is excessive and a denial of due process the defendant relies solely on Castle v. United States, 399 F.2d 642 (5th Cir. 1968). There the court found that the indigent defendant's sentence of ten years' imprisonment and fine of $10,000.00 on conviction of transporting five forged money orders in interstate commerce was not excessive punishment. The court noted that appellate courts have generally refused to disturb the trial court's discretion in sentencing unless the punishment is so disproportionate to the offense committed as to be arbitrary and shocking to the sense of justice and thus to constitute cruel and unusual punishment in violation of the Eighth Amendment. "The cases are legion that a sentence within the statutory limits is not cruel and unusual punishment" Castle, 399 F. 2d at 652.

In Castle, the court also answered the defendant's contention that the mandatory fine violated his right to due process by serving no rehabilitative purpose.

"It might be argued that the excessive fining of an indigent violates substantive due process of law because it does not serve a legitimate end of punishment and, in fact, interferes with rehabilitation. The Supreme Court as recently indicated, however, that rehabilitation is not the only end of punishment and that special and general deterrence are still valid considerations in making the punishment fit the crime. Powell v. State of Texas, 1968, 392 U.S. 514, 88 S. Ct. 2145, 2153, 20 L.Ed. 2d 1254." Castle, 399 F.2d at 652.

See also Gregg v. Georgia, 428 U.S. 153, 184, 96 S.Ct. 2909, 2930, no. 30, 49 L Ed. 2d 85 (1976).

In People v. Broadie, 37 N.Y.2d 100, 332 N.E.2d 338 (1975), it was recognized that rehabilitation is only one of the recognized purposes of penal sanctions. The highest appellate court for the State of New York noted:

"Faced with what it found to be a high recidivism rate in drug-related crimes, an inadequate response to less severe punishment, and an insidiously growing drug abuse problem, the Legislature could reasonably shift the emphasis to other penalogical purposes, namely isolation and deterrence."

"Thus, to achieve the deterrence, so far seemingly elusive, the would-be drug trafficker has to be put on notice that, should he be caught, his fate was sealed regardless of his position in the hierarchy of distribution and regardless of the quantity of drugs in which he dealt." Broadie, 332 N.E.2d at 344.

This entire area is summed up in Hindt v. State, 421 A.2d 1325 (Del. Supr. 1980).

"Very little case law exists on the subject of constitutinally excessive fines. We find well stated, however, the guidelines set forth in State v. Trailer Service, Inc., Wis.Supr., 61 Wis.2d 400, 212 N.W.2d 683, 689 (1973):

"To determine excessiveness of a fine in a constitutional sense, consideration should be given to the object designed to be "accomplished, to the importance and magnitude of the public interest sought to be protected, to the circumstances and nature of the act for which it is imposed, and in some instances the ability of the accused to pay." 24B C.J.S. Criminal Law, Section 1978c, p. 557 (1962). For a fine to be unusual or excessive, it must be so disproportionate to the offense as to shock public sentiment and contrary to the judment of reasonable people conserning what is proper under the circumstances." 421 A. 2d at 1333.

The fine levied against the defendant in this case was fixed and required by statute. Considering the serious problem Section 20-2-80 seeks to combat, the importance of the public interest sought to be protected and the enormous illegal profits involved in the undetected sale of marijuana, the mandatory $25,000.00 fine does not shock our sense of justice and is not disproportionate to the offense committed.

II

The defendant contends that Section 20-2-80(1)(a) constitutes cruel and unusual punishment because it requires a minimum term of imprisonment of three calendar years upon conviction of the possession or sale of a quantity of marijuana in excess of 2.2 pounds but less than 2,000 pounds.

In Broadie, supra, the Court of Appeals of New York upheld "drug" laws which contained sentencing provisions imposing a mandatory maximum sentence of life imprisonment and minimum from one or six years to eight and one-third years against a challenge that such provisions constituted cruel and unusual punishment.

" The principal issue is whether the so-called 'drug' laws, in mandating life imprisonment and, therefore, lifetime parole on parole release, prescribe sentences so disproportionate as

would constitute cruel and unusual punishment in violation of constitutional limitations .....

"There should be an affirmance. The sentences are not grossly disproportionate in constitutional analysis. The Legislature may no distinguish among the ills of society which require a criminal sanction, and prescribe, as it reasonable views them, punishments appropriate to each." Broadie, 371 N.Y.S. 2d at 474-5.

After analyzing the history and purpose of the cruel and unusual punishment clause, the court noted that drug trafficking was a grave offense and posed a serious threat to society. The court found that the severe punishment of the drug trafficking statute was constitutionally permissible.

"Summarizing the various factors and comparisons pertinent to gross disproportionality, the Legislature could reasonably conclude that drug trafficking was a grave offense; that the defendants, as sellers, posed a serious threat to society; and that the sentencing statutes, though severe and inflexible, would serve, at least, to isolate and deter. Compared both 'internally', to punishments for other crimes under the Penal Law, and 'externally', to punishments imposed elsewhere for the same or similar offenses, the narcotics laws are relatively severe, but not irrationally so, given the epidemic dimensions, of the problem.

"On this analysis, the punishments in these cases were not so grossly disproportionate that they may be declared unconstitutional."

Broadie, 332 N.E.2d at 345.

Florida has a drug trafficking statute very similar to Alabama's. In State v. Benitez, 395 So.2d 514 (Fla. 1981), the Supreme Court of Florida held that although the penalties of the drug trafficking statute were "certainly severe" they were

"by no means cruel and unusual in light of their potential deterrent value and the seriousness of the crime involved."

"Appellees also argue that the mandatory sentences in section 893.135 constitute cruel and unusual punishment since they are unnecessarily severe and disproportional to the nature of the crime. This Court has consistently upheld minimum mandatory sentences, regardless of their severity, against constitutional attacks arguing cruel and unusual punishment. See, e.g., McArthur v. State, 351 So.2d 972 (Fla. 1977); Banks v. State, 342 So.2d 469 (Fla. 1976); O'Donnell v. State, 326 So.2d 4 (Fla. 1975). The dominant theme which runs through these decisions is that the legislature, and not the judiciary, determines maximum and minimum penalties for violations of the law. While it is often said that in an extreme case- wherein the sentence was grossly disproportionate to the severity of the crime- the legislature's judgment would run afoul of the constitutional prohibitions, this court has never addressed such a situation in the context of statutory sentencing minima.

"The recent decision of the United States Supreme Court in Rummel v. Estelle, 445, U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980), indicates that similar considerations prevail under the federal constitution. In that case, the Court held that a mandatory life sentence imposed on the petitioner pursuant to a Texas recidivist statute did not constitute cruel and unusual punishment under the eighth amendment. The majority's analysis of this area noted that:

"(t)his Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence which is grossly disproportionate to the severity of the crime.... In recent years this proposition has appeared most frequently in opinions dealing with the death penalty. . . because a sentence of death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishment to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to

Rummel.

"Outside the context of capital punishment, successful challenges to the proportonality of particular sentences have been exceedingly rare.

"Id., 445 U.S. at 271, 100 S. Ct. at 1138 (citations omitted). After analyzing one of these rare successful challenges, Weems v. United States, 217 U.S. 349, ' ' Ct. 544, 54 L.Ed. 793 (1910), the majority concluded

"Given the unique nature of the punishments considered in Weems in the death-penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.

"Id., 445 U.S. at 273, 100 S. Ct. at 1139 (footnote omitted).,, Benitez, 395 So.2d at 518.

We conclude that the mandatory sentences of Alabama's drug trafficking law do not constitute cruel and unusual punishment. See also Paras v. State, 247 Ga. 75 274 S.E. 2d 451 (1981); Opinion of the Justices to the House of Representatives, 393 N.E. 2d. 313 (Mass. 1979).

III

The defendant argues that Section 20-2-81(b)2 denies equal protection of the law to persons convicted of drug trafficking who cannot provide "substantial assistance" to law enforcement officials. In Benitez, 395 So 2d at 519, the Florida Supreme Court found this same argument "patently without merit." As the court did in Benitez, we find that Section 20-2-81 (b) does not operate to deny the defendant equal protection because it passes the "rational basis test." Legislation which does not affect a fundamental" right or a "suspect" class need only bear a "rational relationship" to a legitimate state interest. Thus a classification which does not

affect a fundamental right or a supect class will be upheld unless the varying treatment of different groups or persons is so unrelated to the achievement of any combinationn of legitimate purposes that a court can only conclude that the legislature's actions were arbitrary and irrational. The National Organization For The Reform of Marijuana Laws v. Bell, 488 F.Supp. 123 (D.D. C. 1980). Separate treatment of defendants does not violate any constitutinal guarantee of equal protection so long as that treatment is reasonable and founded on a rational basis.

IV

Finally, the defendant argues that the drug trafficking provisions of the Alabama Code are unconstitutional because the trial judge cannot grant probation or reduce sentence unless the prosecuting attorney so moves the court. Section 20-2-81(b). This same argument was advanced in Benitez and rejected by the Supreme Court of Florida.

"Appellees' second argument premised on the constitutional separation of powers is that subsection (3) usurps the sentencing function from the judiciary and assigns it to the executive branch, since the benefits of subsection ((3) are triggered by the initiative of the state attorney. Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence.So long as a statute does not wrest from the courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities.' People v. Eason, 40 N.Y. 2d 297, 301, 386 N.Y.S. 2d 673, 676, 353 N.E. 2d 587, 589 (1976) (emphasis in original) rejecting a separation of powers attack on a similar provision in New York's drug laws)." Benitez, 395 So.2d at 519.

We hold that Alabama's drug trafficking provisions (Sections 20-2-80-1) are constitutional. The judgment of the circuit court is affirmed.

AFFIRMED.

All Judges Concur.

1. Alabama Code 1975, Section 20-2-80 (Supp. 1981) provides in pertinent part:

"Except as authorized in chapter 2, Title 20

"(1) Any person who knowingly sells, manufactures, delivers, or brings into this state, or who knowingly in actual or constructive possession of, in excess of one kilo or 2.2 pounds of cannabis is guilty of a felony, which felony shall be known as 'trafficking in cannabis'. If the quantity of cannabis involved ;

"a. Is in excess of one kilo or 2.2 pounds, but less than 2,000 pounds, such person shall be sentenced to a mandatory term of imprisonment of three calendar years and to pay a fine of $25,000.00."

2. Alabama Code 1975, Section 20-2-81 (Supp. 1981) provides:

"(a) Notwithstanding the provisions of chapter 22, Title 15, with respect to a person who is found to have violated this article, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this article.

"(b) The prosecuting attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this article and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, coconspirators, or principals. The arresting agency shall be given an opportunity to be heard in aggravation or mitigation in reference to any such motion. Upon good cause shown, the motion may be filed and heard in camera. The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance. (Acts 1980, N. 80-587, p. 926.)"

IN THE SUPREME COURT OF ALABAMA

PALMER G. HOLCOMBE,		COURT OF
APPELLANT		CRIMINAL APPEALS
VS.		
THE STATE OF ALABAMA,		CASE NUMBER
APPELLEE		7th DIV. 869

CIRCUIT COURT OF TALLADEGA COUNTY

SC NO. ----------

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF ALABAMA:

Comes your petitioner, Palmer G. Holcombe, and petitions this Court for a Writ of Certiorari to issue to the Court of Criminal Appeals of Alabama, in the above-styled cause under Rule 39, Ala. R. App. P., and shows the following:

1. Petitioner was convicted of the offense of Trafficking in Cannabis in the Circuit Court of Talladega County, Alabama, on May 25, 1981. The Court of Criminal Appeals affirmed the judgment on March 2, 1982. An application for rehearing was filed on March 15, 1982. An application for reharing was filed on March 15, 1982, and was overruled on April 20, 1982.

2. The Court of Criminal Appeals wrote no opinion in this case. Petitioner was notified of the decision by a letter from the Court of Criminal Appeals dated March 2, 1982, a copy of which is attached to this peitition, which shows the Court of Criminal . ppeals Case No. 7th Div. 869.

The decision of the Court of Criminal Appeals in this case was

as follows, to-wit:
"March 2, 1982. Affirmed on authority of Wheatt v. State, Ala. Cr. App. (Ms. 7 Div. 884, March 2, 1982). All the Judges concur."

A copy of the Court of Criminal Appeals opinion in Wheatt v. State, Ala. Cr. App. (Ms. 7 Div. 884, March 2, 1982), is attached to this petition.

4. Petitioner, along with application for rehearing, under Rule 39 (k), Ala. R. App. P., presented an additional statement of facts to the Court of Criminal Appeals, and requested, by motion, that said Court incorporate said additional facts in its opinion on rehearing. The Court of Criminal Appeals overruled the application for rehearing without opinion, and further failed to grant petitioners Motion to Add Statement of Facts. Petitioner has attached hereto as Appendix "A", copy of said additional statement of facts, and incorporates said statement as a part of this petition, the same as if fully set forth herein.)

5. Petitioner alleges as grounds for the issuance of the writ the following :

(1) The decision of the Court of Criminal Appeals in this case is a decision initially holding that Acts of Alabama (1980), No. 80-587 is valid, and not unconstitutionally violative of Constitution of Alabama (1901), Section 43, as amended by Amendment Number 38. The issue presented in the Court of Criminal Appeals by petitioner, was whether said act was unconstitutional under these constitutional provisions because said act delegates to the prosecuting attorney the inherently judicial functions of determining whether the sentencing Court is empowered to reduce or suspend the sentence of a defendant convicted under the act.

The pertinent provision of the act is as follows :

(b) Notwithstanding the provisions of Chapter 22, title 15, Code of Alabama 1975, with respect to any person who is found to have violated this section, adjudication of guilt or imposition of sentence shall not be suspended, deferred, or withheld, nor shall

such person be eligible for parole prior to serving the mandatory minimum term of imprisonment prescribed by this section.

(c) The prosecuting attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, ... The judge hearing the motion may reduce or suspend the sentence if he finds that the defendant rendered such substantial assistance.

Acts of Alabama (1980), No. 587, Section 1 (b) and (c).

The pertinent provisions of the State Constitution are as follows:

Section 43. Separation of Powers

In the government of this state, except in the instances hereinafter expressly directed or permitted,the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judical shall never exercise the legislative and executive powers, or either of them; to the end that it may be a government of laws and not of men.

Amendment No. 38

The governor shall have power to grant reprieves and commutations to persons under sentence of death. The legislature shall have the power to provide for and to regulate the administration of pardons, paroles, remission of fines and forfeitures, and may authorize the courts having criminal jurisdiction to suspend sentence and to order probation. No pardon shall relieve from civil and political disabilities unless specifically expressed in the pardon.

(2) The decision of the Court of Criminal Appeals in this case is a decision initially hold that Acts of Alabama (1980), No. 80-587 is valid and not unconstitutionally violative of the provisions of the State Constitution and the Federal

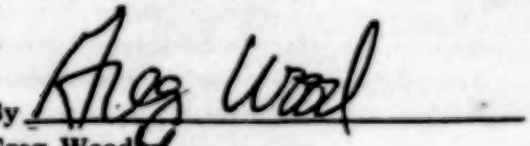
Constitution forbidding cruel or unusual punishment.

Petitioner respectfully requests that after a preliminary examination, the writ of certiorari be granted and that this Court proceed under its rules to review the matters complained of, and to reverse the judgment of the Court of Criminal Appeals, and for such other relief as Petitioner may be entitled.

I certify that I have this day served copies of this Petition and the brief on all other parties to the appeal in the Court of Criminal Appeals.

Respectfully submitted this 4th day of May, 1982.

LOVE, LOVE, LAWRENCE & WOOD

By 
Greg Wood
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Talladega, Alabama 35160
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"ATTACHMENT"

IN THE COURT OF CRIMINAL APPEALS
OF ALABAMA

PALMER G. HOLCOMBE

APPELLANT

VS.

THE STATE OF ALABAMA

APPELLEE

On Appeal from the Circuit Court of Talladega County, Alabama

CASE NO. 7th Div. 869

MOTION TO ADD STATEMENT OF FACTS

Appellant moves the Court, pursuant to Ala. R. App. P. 39 (k), to adopt the Statements contained in Exhibits A and B. attached hereto as additional facts in this Court's written opinion in this case. As grounds appellant shows unto the Court the Following ;

1. That this Court issued no written opinion in this case other than the following

"March 2, 1982, Affirmed on authority of Wheatt v. State, Ala. Cr. App. (Ms. 7 Div 884 March 2, 1982). All the Judges concur."

2. That appellant anticipates seeking review by Certiorari of this Court's decision in this case, in the event appellant is unsuccessful in his application for rehearing before this Court.

3. That the proposed additions are necessary to enable appellant to seek said review by certiorari.

LOVE, LOVE, LAWRENCE & WOOD

By Greg Wood

Greg Wood
Attorneys fo Appellant
Post Office Drawer 297
Talladega, Alabama 35160
(205) 362-2362

EXHIBIT A

STATEMENT OF THE CASE

Appellant was indicted by the Talladega County Grand Jury for violation of Acts of Alabama (1980) No. 80-587. (Trafficking in Cannabis). At arraignment he entered a plea of not guilty. Appellant also filed a demurrer and motion to strike the indictment asserting that the Act was unconstitutional.

At trial, the evidence presented by the State tended to prove the material averments of the indictment, and the jury returned a verdict of guilty, assessing a fine of $25,000.00.

Appellant was sentenced to imprisonment for nine years and was fined in accordance with the verdict. Appellant's application for probatin was denied, at which time the Circuit Court remarked that the application was overruled under the mandatory sentence provisions of the Traffficking law.

EXHIBIT B

(The following excerpts are taken from the opinion of this Court in Wheatt v state, Ala. Cr. App. (Ms. 7 Div. 884, March 2, 1982), as incorporated in this Court's ruling in the instant case.)

II

The defendant contends that Section 20-2-80 (1) (a) constitutes cruel and unusual punishment because it requires a minimum term of imprisonment of three calendar years upon conviction of the possession or sale of a quantity of marijuana in excess of 2.2 pounds but less than 2,000 pounds.

In Broadie, supra, the Court of Appeals of New York upheld "drug" laws which contained sentencing provisions imposing a mandatory maximum sentence of life imprisonment and minimum from one or six years to eight and one-third years against a challenge that such provisions constituted cruel and unusual punishment.

"The principal issue is whether the so called 'drug' laws, in mandating life imprisonment and, therefore, lifetime parole on parole release, prescribe sentences so disproportionate as would constitute cruel and unusual punishment in violation of constitutional limitations...

"There should be an affirmance. The sentences are not grossly disproportionate in constitutional analysis. The Legislature may distinguish among the ills of society which require a criminal sanction, and prescribe, as it reasonably views them, punishments appropriate to each." Broadie, 371 N.Y.S. at 474-5

After analyzing the history and purpose of the cruel and unusual punishment clause, the court noted that drug trafficking was a grave offense and posed a serious threat to

society. The Court found that the severe punishement of the drug trafficking statute was constitutionally permissable.

"Summarizing the various factors and comparisons pertinent to gross disproportionality, the Legislature could reasonably. conclude that drug trafficking was a grave offense; that the defendants, as sellers, posed a serious threat to society; and that the sentencing statutes, though severe and inflexible would serve, at least, to isolate and deter. Compared both internally', to punishments for other crimes under the Penal Law, and 'externally', to punishments imposed elsewhere for the same or similar offenses, the narcotics laws are relatively the epidemic dimensions of the problem.

"On this analysis, the punishments in these cases were not so grossly disproportinate that they may be delared unconstitutional." Broadie, 382 N.E.2d at 345

Florida has a drug trafficking statute very similar to Alabama's. In State v. Benitez, 395 So. 2d 514(Fla. 1981), the Supreme Court of Florida held that although the penalties of the drug trafficking statute were "certainly severe" they were "by no means cruel and unusual in light of their potential deterrent value and the seriousness of crime involved."

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The dominant theme which runs through these decisions is that the legislature,and not the judiciary,determines maximum and minimum penalties for violations of the law. While it is often said that in an extreme case- wherein the sentence was grossly

disproportionate to the severity of the crime-the legislature's judgment would run afoul of the constitutional prohibition, this Court has never addressed such a situation in the context of statutory sentencing minima.

"The recent decision of the United States Supreme Court in Rummel v Estelle, 445 U.S. 263, 100 S. Ct. 1133, 63 L. Ed. 2d 382 (1980), indicates that similar considerations prevail under the federal constitution. In that case, the Court held that a mandatory life sentence imposed on the petitioner pursuant to a Texas recidvist statute did not constitute cruel and unusual punishment under the eighth amendment. The majority's analysis of this area noted that:

"(t) his Court has on occasion stated that the Eighth Amendment prohibits imposition of a sentence which is grossly disproportionate to the severity of the crime...In recent years this proposition has appeared most frequently in opinions dealing with the death differs in kind from any sentence of imprisonment, no matter how long, our decisions applying the prohibition of cruel and unusual punishment to capital cases are of limited assistance in deciding the constitutionality of the punishment meted out to Rummel.

"Outside the context of capital punishment, successful challenges to the proportionality of particular sentences have been exceedingly rare.

"Id.,445 U.S. at 271, 100 S. Ct. at 1138 (citations omitted). After analyzing one of these rare successful challenges, Weems v. United States, 217 U.S. 349, 30 S. Ct. 544, 54 L.Ed.793 (1910), the majority concluded:

"Given the unique nature of the punishments considered in Weems in the death-penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislaturive prerogative.

"Id. 445 U.S. at 273, 100 S. Ct. at 1139 (footnote omitted)" Benitez, 395 So 2d at 518.

We conclude that the mandatory sentences of Alabama's drug trafficking law do not constitute cruel and unusual punishment. See also Paras v. State, 247 Ga.75,274S.E.2d 451 (1981); Opinion of the Justices To The House of Representatives, 393 N. E. 2d 313 (Mass. 1979)

IV

Finally, the defendant argues that the drug trafficking provisions of the Alabama Code are unconstitutional because the trial judge cannot grant probation or reduce sentence unless the prosecuting attorney so moves the court. Section 20-2-81 (b). This same argument was advanced in Benitez and rejected by the Supreme Court of Florida.

"Appellees' second argument premised on the constitutional separation of powers is that subsection (3) usurps the sentencing function from the judiciary and assigns it to the executive branch, since the benefits of subsection (3) are triggered by the initiative of the state attorney. Under the statute, the ultimate decision on sentencing resides with the judge who must rule on the motion for reduction or suspension of sentence. 'So long as a statute does not wrest from the courts the final discretion to impose sentence, it does not infringe upon the constitutional division of responsibilities.' People v. Eason, 40 N.Y. 2d 297, 301, 386 N. Y. S. 2d 673, 676, 353 N. E. 2d 587, 589, (1976) (emphasis in original) (rejecting a separation of powers attack on a similar provision in New York's drug laws)." Benitez, 395 So 2d at 519.

We hold that Alabama's drug trafficking provisions (Sections 20-2-80-1) are constitutional. The judgment of the circuit court is affirmed.

AFFIRMED

All Judges Concur."

RE: Palmer G. Holcombe v. State
7 Div. 869, Talladega Circuit Court No. CC80-398

The Court of Criminal Appeals today announced the following decision in the above-styled cause:

"March 2, 1982. Affirmed on authority of Wheatt v. State, Ala. Cr. App. (Ms. 7 Div. 884, March 2, 1982). All the Judges concur."

(COPY OF WHEATT OPINION ATTACHED)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1982

No._____

Palmer G. Holcombe, Petitioner

v

State of Alabama, Respondent

I hereby certify that on this 1st day of September 1982, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Charles Graddick Esq., Administrative Building, 64th North Union Street, Montgomery, Alabama 36130. Counsel for the Respondent. I further certify that all parties required to be served have been served.

Huel M. Love

Huel M. Love
130 East Street
Talladega, Al. 35160
Counsel for Petitioner